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Changes to the UK's EU Membership Might Require the Consent of the Scottish Parliament

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*In this extended article, **Cormac Mac Amhlaigh** considers the implications of the UK's EU renegotiation and referendum for Scotland's devolution settlement. He suggests that, since changes to EU membership could significantly impact the powers of the devolved institutions, a case could be made that consent for the renegotiation and the referendum would be needed from the Scottish Parliament.*

There are many complex dimensions to the UK Government's current proposals for constitutional reform, in the light of the Conservatives' electoral win earlier this year, from the viewpoint of the devolution of powers to Scotland.

In this article, I will focus on the constitutional implications of changes in the relationship between the UK and the EU for the devolution of powers to Scotland. More specifically, I will consider whether the proposed reforms would require a Legislative Consent Motion from the Scottish Parliament.

A Legislative Consent Motion (LCM) is passed by a devolved legislature as a means of endorsing legislation from the UK Parliament which affects an area of policy that has been devolved. This practice is governed by the [Sewel Convention](#) when applied to Scotland, is not a legal requirement, as the UK Parliament has the power to legislate on any matter, even if devolved, in line with the doctrine of parliamentary sovereignty. In practice, the UK Government regularly seeks LCMs before legislating on devolved competences.

The kind of events triggering a Legislative Consent Motion have crystallised over the life of the Scottish Parliament. Its importance was highlighted in the recent [Smith Commission proposals](#), which recommended putting it on a statutory footing.

It is trite law that the UK Parliament retains the power *in law* to repeal the [European Communities Act 1972](#) (ECA), which gives legal and constitutional effect to the UK's current membership of the EU, as well as amend or repeal parts or all of the [Scotland Act 1998](#) (SA).

It is constitutional convention which gives the Legislative Consent Motion its bite. Any attempt by the UK Parliament to act in breach of the convention would have significant political ramifications.

The Sewel Convention

The proposed Scotland Bill 2015–2016 [Draft Clauses](#) provide the following formulation for the Sewel Convention (emphasis added):

It is recognised that the Parliament of the United Kingdom *will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.*

This has been [interpreted](#) as relating *exclusively* to legislating on matters under the competence of the Scottish Parliament at any particular time. However, it is becoming increasingly [accepted](#) that the convention also extends to the *modification of the powers of the devolved institutions* through amendments to the Scotland Act.

The invocation of the convention during the passage of the [Scotland Act 2012](#) arguably confirms this position. The Scotland Bill 2015–2016 does not explicitly mention the *modification* of the powers of the Scottish Parliament, as opposed to legislating on those matters currently within the Parliament's competence. It is not clear whether this proposed wording will have any impact on the current expansive understanding of the convention, as relating both to legislation on current powers *and* attempts to vary those powers.

Adopting the more expansive definition, the question addressed in this analysis is whether the proposed amendments to the *status quo* with respect to the UK's EU membership would result in the UK Parliament (a) legislating on a devolved power or (b) attempting to vary the powers of the Scottish Parliament.

The question of EU membership affects the division of powers between the Scottish and UK Parliaments in two ways. First, it concerns EU law-related powers in the Scotland Act 1998 based on the European Communities Act 1972. Second, it involves EU law-related powers under the definition of 'EU law' contained in the Scotland Act 1998.

The European Communities Act

The European Communities Act 1972 is the legal measure which essentially gives effect to the UK's EU membership. It is the portal through which the vast amount of EU law is recognised and enforced within the UK, as well as providing for its direct effect and for the jurisdiction of the EU courts.

Whereas the most significant powers contained in the ECA are reserved under a specific reservation under Schedule 4 of the Scotland Act, some of the powers under the ECA have been devolved to ensure uniform implementation of EU law.

Schedule 4, Part 1(2)(c) SA reserves to the UK Parliament the powers to define EU law for the purposes of the Act (s.1 ECA), to give direct effect to EU law (s.2(1) ECA) and to determine the jurisdiction of the EU courts and the relevance of their decisions within the UK (s.3(1)–(2) ECA). However, the powers of the Scottish Government to observe and implement EU law through executive powers *are*

devolved, as part of the bundle of executive powers devolved in s.53 SA, read in conjunction with the explicit devolution of s.2(2) ECA in Schedule 4 Part 1(2)(c) SA.

The power of Scottish ministers to have regard to the objectives of the EU when exercising powers granted by an Act of the Scottish Parliament, as well as the power of the Parliament to annul such an exercise by resolution, are also devolved through the non-reservation of s.2(2) ECA in Schedule 4, Part 1(2)(c) SA. Finally, the devolution of executive powers contained in s.2(2) ECA does not preclude UK ministers from exercising these s.2(2) ECA powers for Scotland (s.57(1) SA).

Even if the devolved ECA-related powers are relatively limited, it could be argued that a repeal of the ECA would trigger the Sewel Convention, given the way the ECA is embedded in the SA in the devolution of powers to the Scottish Parliament.

Firstly, the power of Scottish ministers to implement EU law and the powers of the Scottish Parliament to annul orders of Scottish ministers interpreting EU law rely on interpretations of the ECA. These powers have effect through their devolution under Schedule 4 and the amendment of the ECA itself to include Scottish ministers and the Scottish Parliament under Sch 8, Para 15.

Repeal of the ECA would empty these transfers of powers of their meaning. This would create a more general power of the Scottish Government to implement EU law, unconstrained by the wording of s.2(2) ECA, thus triggering the convention.

As referenced above, the Scottish Parliament is prohibited from determining (and in particular restricting) the effects of EU law in Scotland, as well as the nature and extent of the jurisdiction of EU courts in the interpretation of EU law, as these powers stemming from the ECA are explicitly reserved.

In the light of the 'reserved model' of devolution of powers under the SA, these impediments on the Parliament's powers, through their explicit reservation in Schedule 4, would cease to exist if the ECA were repealed. This would have the effect of expanding the powers of the Parliament, [triggering](#) the convention on the second ground.

EU Law-Related Powers and the Scotland Act

The other main EU law question on the competences of the devolved institutions relates to definition of 'EU law' within the Scotland Act itself. The Scotland Act deprives the devolved institutions of the ability to violate EU law, stating that any such act which purports to do so is simply 'not law'.

In the SA, 'EU law' is defined in s. 126(9) which, significantly, *makes no reference to the ECA*. This has the effect of giving the term 'EU law', and the obligations stemming from it, an *autonomous meaning* for the purposes of the application of the (non-ECA based parts of) the Act. As such, EU law has effects vis-à-vis the activities of the devolved institutions *independently of the ECA*.

Alongside the specific transfer of executive competences to implement EU law through the provisions of the ECA discussed above then, the SA arguably also

contains a more general power to implement EU law stemming from the provisions of the SA itself. This can be read into Para 7 of Schedule 5 SA which explicitly states that the observation and implementation of EU law (autonomously defined in the SA itself) is *not* a reserved matter.

As such, both the Scottish Parliament and Government have the power to observe and implement EU law within their devolved competences, which relates directly to the provisions of the EU treaties themselves through the autonomous definition in s.126 SA.

This fact has a number of implications. In the first instance, were the UK to withdraw from the EU, this would involve making EU law inapplicable in the UK. Fresh legislation specifically amending the Scotland Act would be required in order for Scotland to 'leave' the EU, as it were, given that EU law has an autonomous meaning within the SA. This process could bring about both grounds triggering the convention.

With regard to the first ground, legislation to deprive EU law of any effectiveness in the UK upon secession from the EU would necessarily entail removing the general powers of the Scottish Parliament and Government to implement EU law within their respective competences. This would constitute an attempt to legislate on a devolved matter, activating the first ground of the convention.

With regard to the second ground, legislation to amend the SA would likely remove the devolved institutions' obligation to respect EU law – in essence, withdrawing a significant encumbrance on their legislative and executive competence. This would constitute a *major augmentation* of the competences of the devolved institutions, thereby meeting the second ground of the convention, given that it would be a considerable *varying* of the legislative competence of the Parliament.

Modifying or Replacing the European Communities Act

The case of repealing the ECA or making the necessary amendments to give effect to UK withdrawal from the EU are relatively clear. The question of the renegotiation of the UK's EU membership, short of withdrawal, is more complicated.

Much will depend on the result of the negotiations by the UK Government with its EU partners and the reforms that can be secured. The UK Government has set out a list of aims in the renegotiation process. These include an 'opt out' from the reference to an 'ever closer union' in the EU treaties; restricting certain benefits of EU citizens; and bolstering the power of national parliaments to veto EU legislation.

Further objectives involve supporting continued enlargement; reducing regulation on business and boosting free trade globally; protection for the City of London from EU regulation; and safeguards to protect the interests of non-Eurozone EU Member States.

As this list is extremely broad, it is not clear which, if any, will ever see the light of day in the renegotiated settlement. Any discussion of grounds for triggering the Sewel Convention here therefore remains wholly speculative.

Two points are reasonably clear. First, any Westminster legislation introduced to give effect to the negotiated reforms which touches upon devolved powers is a clear case of the first ground for triggering the convention.

Second, the question of the negotiations themselves, including the various reforms proposed, fall reasonably clearly within the ‘foreign affairs’ part of reserved powers under Para 7, Schedule 5 SA – although the foreign affairs concordat (cooperation agreement between the UK Government and devolved governments) would presumably still apply.

One question that may emerge is whether the attempt to make changes to the foundational aspects of the EU treaties would be cause for triggering the convention. However, it is arguable that there are limits to what, precisely, can be amended. Were such amendments to result in a fundamental change to the EU – for example, relating to its aims or objectives – then there might be grounds for arguing that the convention is activated.

The key provision illustrating this point is the ‘implementing’ powers of the Scottish Government pursuant to an Act of the Scottish Parliament under Para 15, Schedule 8 SA, read in conjunction with s.2(2) ECA. The effect of these combined provisions is to allow the Scottish Government to ‘have regard to the *objects of the EU*’ when exercising powers conferred upon it by the Scottish Parliament.

Were the negotiations to result in a fundamental change to such ‘objects’, then this could be interpreted as affecting the (devolved) power of the Scottish Government to act pursuant to the provisions of Scottish legislation.

It is at least arguable that the removal of the commitment to an ‘ever closer union’ constitutes just such a fundamental change to the EU’s ‘objects’, as it has been one of the original and prominent objectives of the EU since its inception.

A final, intriguing possibility is whether the EU Referendum Bill, currently making its way through the UK Parliament to set up the referendum, itself requires a Legislative Consent Motion. It could be argued that it does.

The precedent is of course the prelude to the Scottish independence referendum, where the arguments surrounding the [legality](#) of the referendum were predicated on whether a referendum on independence ‘relates to’ reserved matters including the constitution and the Union.

Proponents of the legality of the referendum without specific ‘permission’ from Westminster argued that the referendum was tantamount to a poll and not an attempt to legislate on the constitution, which would be clearly outwith the competence of the Scottish Parliament. However, others, including the [UK Government](#), argued that holding a referendum was a clear attempt to legislate on the constitution, given that its effects ‘in all the circumstances’ would be an attempt to take Scotland out of the Union.

Now, the terms of the Sewel Convention, being a convention, are much less certain than the (relatively clearer) provisions of the Scotland Act.

However, it is at least arguable that the legislation currently going through the UK Parliament for the EU referendum constitutes an attempt to modify the powers of the devolved institutions, given that the potential effects of the referendum – the UK withdrawing from the EU and the legislative changes necessary to give effect to this – would, as I have demonstrated here, trigger the convention.

Viewed in this light, the SNP's claim to a 'Scottish veto' on EU withdrawal may have a stronger basis in the constitution than would first appear.

The author recently gave [written evidence](#) to the Scottish Parliament's European and External Relations Committee [inquiry](#) on EU Reform and the EU Referendum: Implications for Scotland.

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